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NAVSO P 2319  
CGM 5800.5B

Military Justice

# **COURTS OF MILITARY REVIEW—RULES OF PRACTICE AND PROCEDURE**

Headquarters  
Departments of the Army, The Air Force,  
The Navy, and The United States Coast  
Guard  
Washington, DC  
29 May 86

**UNCLASSIFIED**

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# ***SUMMARY of CHANGE***

AR 27-13/AFR 111-4/NAVSO P 2319/CGM 5800.5B  
COURTS OF MILITARY REVIEW—RULES OF PRACTICE AND PROCEDURE

This change 1--

- o Amends Rule 21 with regard to the procedure and time limits for the filing of government appeals of trial judge rulings.
  
- o This revision, in conformity with the Military Justice Act of 1983 and Manual for Courts-Martial 1984, changes past practice and procedures in several significant areas, and alters other procedures and terminology to conform to federal practice;
- o Rule 21 establishes procedures for government appeals;
- o Rule 14 provides for waiver or withdrawal of appellate review;
- o Rule 10, 11 and 12 consolidate and rearrange former Rules 10, 11, 12 and 15;
- o Rule 13 permits notice to be filed with the court instead of The Judge Advocate General;
- o Rule 19 extends time for reconsideration of a decision from 10 to 20 days, but permits time to begin running upon service on counsel instead of the accused;
- o Rule 20 details requirements for extraordinary writs;
- o Rule 15 conforms terminology concerning briefs to federal practice;
- o Rule 17 styles en banc request as suggestions instead of motions.

Headquarters  
Departments of the Army, The Air  
Force, The Navy, and The United  
States Coast Guard  
Washington, DC  
29 May 86

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Effective 29 May 86

Military Justice

COURTS OF MILITARY REVIEW—RULES OF PRACTICE AND PROCEDURE

BY ORDER OF THE SECRETARIES OF THE ARMY, THE AIR FORCE, THE NAVY,  
AND THE GENERAL COUNSEL OF THE DEPARTMENT OF TRANSPORTATION

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incorporates Change 1, which remains in effect.  
**Summary.** This regulation publishes the rules of practice and procedure for courts of military review, pursuant to the Uniform Code of Military Justice, Article 66(f) (10 U.S.C. 866). When the title "The Judge Advocate General" is used in a rule, it includes the General Counsel of the Department of Transportation when the Coast Guard is not operating as a service in the Navy. The effective date of these rules is 1 March 1985.  
**Applicability.** This regulation applies to The Judge Advocates General of the Department of the Air Force, the Army, and the Navy and the General Counsel of the Department of Transportation. The effective date of these rules is 1 March 1985.  
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### **1. Rule 1. NAME AND SEAL.**

*a.* The titles of the Courts of Military Review of the respective services are:

- (1) "United States Army Court of Military Review."
- (2) "United States Navy–Marine Corps Court of Military Review."
- (3) "United States Air Force Court of Military Review"
- (4) "United States Coast Guard Court of Military Review."

*b.* Each Court is authorized a seal in the discretion of the Judge Advocate General concerned. The design of such seal shall include the title of the Court.

### **2. Rule 2. JURISDICTION.**

*a.* The jurisdiction of the Court is as follows:

(1) Review under Article 66. All cases of trial by court-martial in which the sentence as approved extends to:

(*a*) death; or

(*b*) dismissal of a commissioned officer, cadet, or midshipman, dishonorable or bad conduct discharge, or confinement for 1 year or longer; and the accused has not waived or withdrawn appellate review.

(2) Review upon Direction of the Judge Advocate General Under Article 69. All cases of trial by general court-martial in which there have been a finding of guilty and a sentence:

(*a*) for which article 66 does not otherwise provide appellate review, and

(*b*) which the Judge Advocate General forwards to the Court for review, and

(*c*) in which the accused has not waived or withdrawn appellate review.

(3) Review under Article 62. All cases of trial by court-martial in which a punitive discharge may be adjudged and a military judge presides, and in which the Government appeals an order or ruling of the military judge that terminates the proceedings with respect to a charge or specification or excludes evidence that is substantial proof of a fact material to the proceedings.

(4) Review under Article 73. All petitions for a new trial in cases of trial by court-martial which are referred to the Court by the Judge Advocate General.

*b.* Extraordinary Writs. The Court may, in its discretion, entertain petitions for extraordinary relief including, but not limited to, writs of mandamus, writs of prohibition, writs of habeas corpus, and writs of error coram nobis.

*c.* Effect of Rules on Jurisdiction. Nothing in these rules shall be construed to extend or limit the jurisdiction of the Courts of Military Review as established by law.

### **3. Rule 3. SCOPE OF REVIEW.**

In cases referred to it for review pursuant to Article 66, the Court may also act only with respect to the findings and sentence as approved by the convening authority. In determining an appeal under Article 62, the Court may act only with respect to matters of law. The Court may, in addition, review such other matters and take such other action as it determines to be proper under substantive law.

### **4. Rule 4. QUORUM.**

*a. In Panel.* When sitting in panel, a majority of the judges assigned to that panel constitutes a quorum for the purpose of hearing or determining any matter referred to the panel. The determination of any matter referred to the panel shall be according to the opinion of a majority of the judges participating in the decision. However, any judge present for duty may issue all necessary orders concerning any proceedings pending on panel and any judge present for duty, or a Clerk of Court of Commissioner to whom the Court has delegated authority, may act on uncontested motions, provided such action does not finally dispose of a petition, appeal, or case before the Court.

*b. En banc.* When sitting as a whole, a majority of the judges of the Court constitutes a quorum for the purpose of hearing and determining any matter before the Court. The determination of any matter before the Court shall be according to the opinion of a majority of the judges participating in the decision. In the absence of a quorum, any judge present for duty may issue all necessary orders concerning any proceedings pending in the Court preparatory to hearing or decision thereof.

### **5. Rule 5. PLACE FOR FILING PAPERS.**

When the filing of a notice of appearance, brief, or other paper in the office of a Judge Advocate General is required by these rules, such papers shall be filed in the office of the Judge Advocate General of the appropriate armed force. If transmitted by mail or other means, they are not filed until received in such office.

### **6. Rule 6. SIGNING OF PAPERS.**

All formal papers shall be signed and shall show, typewritten or printed, the signer's name, address, military grade (if any), and the capacity in which the paper is signed. Such signature constitutes a certification that the statements made

therein are true and correct to the best of knowledge, information, and belief of the persons signing the paper and that the paper is filed in good faith and not for purpose of unnecessary delay.

#### **7. Rule 7. COMPUTATION OF TIME.**

In computing any period of time prescribed or allowed by these rules, by order of the Court, or any applicable statute, the day of the act, event or default after which the designated period of time begins to run is not to be included. The last day of the period so computed is to be included, unless it is a Saturday, Sunday, or legal holiday, in which event the period runs until the end of the next day which is neither a Saturday, Sunday, nor a holiday. When the period of time prescribed or allowed is less than 7 days, intermediate Saturdays, Sundays, and holidays shall be excluded in the computation.

#### **8. Rule 8. QUALIFICATION OF COUNSEL.**

*a. All Counsel.* Counsel in any case before the Court shall be a member in good standing of the bar of a Federal Court, the highest court of a State or another recognized bar.

*b. Military Counsel.* Assigned appellate defense and appellate government counsel shall, in addition, be qualified in accordance with Articles 27(b)(1) and 70(a), Uniform Code of Military Justice.

*c. Admission.* Each Court may license counsel to appear before it. Otherwise, upon entering an appearance, counsel shall be deemed admitted *pro hac vice*, subject to filing a certificate setting forth required qualifications if directed by the Court.

*d. Suspension.* No counsel may appear in any proceeding before the Court while suspended from practice by the Judge Advocate General of the service concerned.

#### **9. Rule 9. CONDUCT OF COUNSEL.**

The conduct of counsel appearing before the Court shall be in accordance with rules of conduct prescribed pursuant to Rule for Courts-Martial 109 by the Judge Advocate General of the service concerned. In addition, the Court may exercise its inherent power to regulate counsel appearing before it, including the power to remove on an ad hoc basis counsel misbehaving before or in relation to their appearance before the Court. Conduct deemed by the Court to warrant consideration of suspension or other professional discipline shall be reported by the Court to the Judge Advocate General concerned.

#### **10. Rule 10. REQUEST FOR APPELLATE DEFENSE COUNSEL.**

An accused may be represented before the Court by appellate counsel detailed pursuant to Article 70(a) or by civilian counsel provided by the accused, or both. An accused who does not waive appellate review pursuant to Rule for Courts-Martial 1110, shall within 10 days after service of a copy of the convening authority's action under Rule for Courts-Martial 1107(h), forward to the convening authority of the Judge Advocate General

*a.* A request for representation by military appellate defense counsel, or

*b.* Notice that civilian counsel has been retained or that action has been taken to retain civilian counsel (must include name and address of civilian counsel), or

*c.* Both a request for representation by military appellate defense counsel under Rule 10(a) and notice regarding civilian counsel under Rule 10(b), or

*d.* A waiver of representation by counsel.

#### **11. Rule 11. ASSIGNMENT OF COUNSEL.**

*a.* When a record of trial is referred to be the Court—

(1) if the accused has requested representation by appellate defense counsel, pursuant to Article 70(c)(1), counsel detailed pursuant to Article 70(a) will be assigned to represent the accused;

(2) if the accused gives notice that he or she has retained or has taken action to retain civilian counsel, appellate defense council shall be assigned to represent the interests of the accused pending appearance of civilian counsel. Assigned defense counsel will continue to assist after appearance by civilian counsel unless excused by the accused;

(3) if the accused has neither requested appellate counsel nor given notice of action to retain civilian counsel, but has not waived representation by counsel, appellate defense counsel will be assigned to represent the accused, subject to excusal by the accused or by direction of the Court.

*b.* In any case—

(1) the Court may request counsel when counsel have not been assigned;

(2) pursuant to Article 70(c)(2), appellate defense counsel will represent the accused when the United States is represented by counsel before the Court.

#### **12. Rule 12. RETENTION OF CIVILIAN COUNSEL.**

When civilian counsel represents an accused before the Court, the Court will notify counsel when the record of trial is received. If both civilian and assigned appellate defense counsel represent the accused, the Court will regard civilian

counsel as primary counsel unless notified otherwise. Ordinarily, civilian counsel will use the accuser's copy of the record. Civilian counsel may reproduce, at no expense to the Government, appellate defense counsel's copy of the record.

### **13. Rule 13. NOTICE OF APPEARANCE OF COUNSEL.**

Military and civilian appellate counsel shall file a written notice of appearance with the Court. The filing of any pleading relative to a case which contains the signature of counsel constitutes notice of appearance of such counsel.

### **14. Rule 14. WAIVER OF WITHDRAWAL OF APPELLATE REVIEW.**

Withdrawals from appellate review, and waivers of appellate review filed after expiration of the period prescribed by Rule for Courts-Martial 1110(f)(1), will be referred to the Court for consideration. At its discretion, the Court may require the filing of a motion for withdrawal, issue a show cause order, or grant the withdrawal without further action, as may be appropriate. The Court will return the record of trial, in a case withdrawn from appellate review, the Judge Advocate General for action pursuant to Rule for Courts-Martial 1112.

### **15. Rule 15. ASSIGNMENTS OF ERROR AND BRIEFS.**

*a. General Provisions.* Appellate counsel for the accused may file an assignment of error if any are to be alleged, setting forth separately each error asserted. The assignment of errors should be included in a brief for the accused (attachment 2), which is in appendix B. An original of all assignments of error and briefs, and as many additional copies as shall be prescribed by each service, shall be submitted. Briefs and assignments of errors shall be typewritten, double-spaced on white paper, and securely fastened at the top. All references to matters contained in the record shall show record page numbers and any exhibit designations. A brief on behalf of the government shall be of like character as that prescribed for the accused.

*b. Number of Briefs.* Appellate counsel shall be limited to the filing of one brief for each side unless the Court otherwise permits or directs.

*c. Time for Filing.* Any brief for an accused shall be filed within 30 days after appellate counsel has been notified of the receipt of the record in the Office of the Judge Advocate General. If the Judge Advocate General has directed appellate government counsel to represent the United States, such counsel shall file an answer on behalf of the government within 30 days after any brief and assignment of errors has been filed on behalf of an accused. If no brief is filed on behalf of an accused, a brief on behalf of the government may be filed within 30 days after expiration of the time allowed for the filing of a brief on behalf of the accused.

### **16. Rule 16. ORAL ARGUMENTS.**

Oral arguments may be heard in the discretion of the Court upon motion by either party or when otherwise ordered by the Court. The motion of a party of oral argument shall be made when that party's pleading is filed or within 5 days after the filing of any response thereto permitted under these rules.

### **17. Rule 17. EN BANC PROCEEDINGS.**

*a.* A majority of the judges present for duty may order that any appeal or other proceeding be considered or reconsidered, except as indicated in section (c) below, by the Court sitting as a whole. Such consideration or reconsideration ordinarily will not be ordered except (1) when consideration by the full Court is necessary to secure or maintain uniformity of decision, or (2) when the proceedings involve a question of exceptional importance, or (3) when a sentence being reviewed pursuant to Article 66 extends to death.

*b.* A party may suggest the appropriateness of consideration or reconsideration by the Court as a whole. If a party desires to suggest in cases being reviewed pursuant to Article 66, that a matter be considered initially by the Court as a whole, the suggestion must be filed with the Court within 5 days after the government files its answer to the assignment of errors, or the accused files a reply if permitted to do so under Rule 15(b). In other proceedings the suggestion must be filed with the party's initial petition or other initial pleading, or within 5 days after the response thereto is filed. A suggestion of reconsideration by the Court as a whole must be made within the time prescribed by Rule 19 for filing a motion for reconsideration. No response to the suggestion may be filed unless the Court shall so order.

*c.* The suggestion of a party for consideration or reconsideration by the Court as a whole shall be transmitted to each judge of the Court who is present for duty, but a vote need not be taken to determine whether the cause shall be considered or reconsidered by the Court as a whole unless a judge requests a vote on such a suggestion made by a party. En banc reconsideration of an en banc decision will not be held unless one member of the original majority concurs in a vote for reconsideration.

### **18. Rule 18. ORDERS AND DECISIONS OF THE COURT.**

The Court shall give notice of its orders and decisions pursuant to Rule for Courts-Martial 1203. The Court shall



immediately serve such orders or decisions, when rendered, on appellate defense counsel, government counsel and The Judge Advocate General, or designee, as appropriate.

#### **19. Rule 19. RECONSIDERATION.**

a. The Court may, in its discretion and on its own motion, enter an order to reconsider its decision in any case not later than 30 days after service of such decision on the accused's appellate defense counsel or on the accused, if the accused is not represented by appellate counsel, provided a petition for grant of review or certificate for review has not been filed with the United States Court of Military Appeals, or a record of trial for review under Article 67(b) has not been received by that Court. Copies of such order will be served on appellate defense counsel and appellate government counsel. No briefs or arguments shall be received unless the order so directs.

b. Provided a petition for grant of review or certificate for review has not been filed with the United States Court of Military Appeals, or a record of trial for review under Article 67(b) has not been received by the United States Court of Military Appeals, the Court may, in its discretion, reconsider its decision in any case upon motion filed either:

(1) By appellate defense counsel within 20 days after receipt by counsel, or by the accused if the accused is not represented by counsel, of a decision or order, or

(2) By appellate government counsel within 20 days after the decision or order is received by counsel.

c. A motion for reconsideration shall briefly and directly state the grounds for reconsideration, including a statement of facts showing jurisdiction in the Court. A reply to the motion for reconsideration will be received by the Court only if filed within 5 days of receipt of a copy of the motion. Oral arguments shall not be heard on a motion for reconsideration unless ordered by the Court. The original of the motion filed with the Court shall indicate the date of receipt of a copy of the same by opposing counsel.

d. The time limitations prescribed by this rule shall not be extended under the authority of Rule 24 or Rule 25 beyond the expiration of the time for filing a petition for review by the United States Court of Military Appeals, except that the time for filing briefs by either party may be extended for good cause.

#### **20. Rule 20. PETITIONS FOR EXTRAORDINARY RELIEF, ANSWER, AND REPLY.**

a. *Petition for Extraordinary Relief.* A petition for extraordinary relief in the number of copies required by the Court shall be accompanied by proof of service on each party respondent and will contain:

(1) A previous history of the case including whether prior actions have been filed or are pending for the same relief in this or any other court and the disposition or status of such actions;

(2) A concise and objective statement of all facts relevant to the issue presented and of any pertinent opinion, order or ruling;

(3) A copy of any pertinent parts of the record and all exhibits related to the petition if reasonably available and transmittable at or near the time the petition is filed;

(4) A statement of the issue;

(5) The specific relief sought;

(6) Reasons for granting the writ;

(7) The jurisdictional basis for relief sought and the reasons why the relief sought cannot be obtained during the ordinary course of appellate review;

(8) If desired, a request for appointment of appellate counsel.

b. *Format.* The title of the petition shall include the name, military grade and service number of each named party and, where appropriate, the official military or civilian title of any named party acting in an official capacity as an officer or agent of the United States. When an accused has not been named as a party, the accused shall be identified by name, military grade and service number by the petitioner and shall be designated as the real party in interest.

c. *Electronic message petitions.* The Court will docket petitions for extraordinary relief submitted by means of an electronic message. The message will conclude with the full name and address of petitioner's counsel, if any, and will state when the written petition and brief, when required, were placed in the mail addressed to the Court and to all named respondent.

d. *Notice to the Judge Advocate General.* Immediately upon receipt of any petition, the Clerk shall forward a copy of the petition to the appropriate Judge Advocate General or designee.

e. *Briefs.* Each petition for extraordinary relief must be accompanied by a brief in support of the petition unless it is filed *in propria persona*. The Court may issue a show cause order in which event the respondent shall file an answer within 10 days of the receipt of the show cause order. The petitioner may file a reply to the answer within 5 days of receipt of the answer.

f. *Initial Action by the Court.* The Court may dismiss or deny the petition, order the respondent to show cause and file an answer within the time specified, or take whatever other action it deems appropriate.

g. *Oral Argument and Final Action.* The Court may set the matter for oral argument. However, on the basis of the pleadings alone, the Court may grant or deny the relief sought or make such other order in the case as the

circumstances may require. This includes referring the matter to a special master, who need not be a military judge, to further investigate; to take evidence; and to make such recommendations as the Court deems appropriate.

## **21. Rule 21. APPEALS BY THE UNITED STATES.**

*a. Restricted Filing.* Only a representative of the government designated by the Judge Advocate General of the respective service may file an appeal by the United States under Article 62.

*b. Counsel.* Counsel must be qualified and appointed, and give notice of appearance in accordance with these rules and those of the Judge Advocate General concerned.

*c. Form of Appeal.* The appeal must include those documents specified by Rule for Courts-Martial 908 and by applicable regulations of the Secretary concerned. A certificate of the Notice of Appeal described in Rule for Courts-Martial 908(b)(3) must be included. The certificate of service must reflect the date and time of the military judge's ruling or order from which the appeal is taken, and the time and date of service upon the military judge.

*d. Time for Filing.* All procedural Rules of the Court shall apply except as noted herein:

(1) The representative of the Government designated by the Judge Advocate General shall decide whether to file the appeal with the Court of Military Review. The trial counsel shall have 20 days from the date written notice to appeal, including an original and three copies of the record of trial, to the representative of the Government designated by The Judge Advocate General. The person designated by The Judge Advocate General shall promptly file the original record with the Clerk of the Court of Military Review and forward one copy to opposing counsel. Appellate government counsel shall have 20 days (or more upon a showing of good cause made by motion for enlargement within 20 days) from the date the record is filed with the Court to file the appeal with supporting brief with the Court of Military Review. Should the Government decide to withdraw the appeal after the record is received by the Court of Military Review, appellate government counsel shall notify in writing the Court of Military Review. Appellate brief(s) shall be prepared in the manner prescribed by Rule 15.

(2) Appellee shall prepare an answer in the manner prescribed by Rule 15 and shall file such answer within 20 days after any filing of the government brief.

*e.* The government shall diligently prosecute all appeals by the United States and the Court will give such appeals priority over all other proceedings where practicable.

## **22. Rule 22. PETITIONS FOR NEW TRIAL.**

*a. General Provisions.* The Court shall, as soon as practicable after receipt from the Judge Advocate General of a petition for a new trial in a case pending before the Court, notify appellate counsel of such receipt.

*b. Additional Investigation.* The Court on considering a petition for a new trial may, when it deems appropriate, refer the matter to the Judge Advocate General who shall cause further investigation to be made and to report the results thereof to the Court.

*c. Answer.* Appellate government counsel shall file an answer to a petition for new trial within 10 days after being notified of the receipt thereof by the Court.

*d. Briefs.* Any brief in support of a petition for new trial shall be filed within 10 days of appellate government counsel's answer. If appellate government counsel fails to file an answer, accused may file a brief within 10 days after the expiration of the time allowed for the filing of appellate government counsel's answer. Appellate government counsel's brief shall be filed within 10 days of the filing of accused's brief. If accused fails to file a brief, appellate government counsel may file a brief within 10 days after the expiration of the time allowed for filing of accused's brief.

*e. Oral Argument.* Except when ordered by the Court, oral argument shall not be permitted on a petition for a new trial.

## **23. Rule 23. MOTIONS.**

*a. Content.* All motions, unless made during the course of a hearing, shall state with particularity the relief sought and the grounds therefor, Motions, pleadings, and other papers desired to be filed with the Court may be combined in the same document, with the heading indicating, for example "MOTION TO FILE (SUPPLEMENTAL ASSIGNMENT OF ERRORS) (CERTIFICATE OF CORRECTION) (SUPPLEMENTAL PLEADING)", or "ASSIGNMENT OF ERRORS AND MOTION TO FILE ATTACHED REPORT OF MEDICAL BOARD".

*b. Opposition.* Any opposition to a motion shall be filed within 5 days after receipt by the opposing party of service of the motion.

*c. Leave to File.* Any pleading not required by these rules shall be accompanied by a motion for leave to file such pleading.

*d. Oral Argument.* Except when ordered by the Court, oral argument shall not be permitted on motions.

## **24. Rule 24. CONTINUANCES AND INTERLOCUTORY MATTERS.**

Except as otherwise provided in Rule 19(d), the Court, in its discretion, may extend any time limits prescribed and may

dispose of any interlocutory or other appropriate matter not specifically covered by these rules, in such manner as may appear to be required for a full, fair, and expeditious consideration of the case. See Rule 4.

**25. Rule 25. SUSPENSION OF RULES.**

For good cause shown, the Court acting as a whole or in panel may suspend the requirements or provisions of any of these rules in a particular case on petition of a party or on its own motion and may order proceedings in accordance with its direction.

**26. Rule 26. INTERNAL RULES.**

The Chief Judge of the Court has the authority to prescribe internal rules for the Court.

**27. Rule 27. RECORDING, PHOTOGRAPHING, BROADCASTING, OR TELECASTING OF HEARINGS.**

The recording, photographing, broadcasting, or televising of any session of the Court or other activity relating thereto is prohibited unless specifically authorized by the Court sitting as a whole.

## **Appendix A REFERENCES**

### **Section I Required Publications**

This section contains no entries.

### **Section II Related Publications**

This section contains no entries.

### **Section III Prescribed Forms**

This section contains no entries.

### **Section IV Referenced Forms**

This section contains no entries.

## **Appendix B ATTACHMENTS 1 & 2**

### **B-1. Attachment 1—FORMAT FOR DIRECTION FOR REVIEW IN THE UNITED STATES ARMY\* COURT OF MILITARY REVIEW**

Format for Direction for Review in the United States Army\* Court of Military Review

UNITED STATES  
v.  
Private (E-1) JOHN RICHARD  
DOE, SSN 000-00-000,  
Company, 300th Infantry Division,  
APO New York 09000

DIRECTION FOR REVIEW  
Case No. \_\_\_\_\_  
Tried at \_\_\_\_\_, on \_\_\_\_\_  
before a G.C.M. appointed  
by \_\_\_\_\_.

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES ARMY\*  
COURT OF MILITARY REVIEW

1. Pursuant to the Uniform Code of Military Justice, Article 69, and the Rules of Practice and Procedure for Courts of Military Review, Rule 2b, the record of trial in the above-entitled case is forwarded for review pursuant to the Uniform Code of Military Justice, Article 66.

2. The accused was found guilty of a violation of the Uniform Code of Military Justice, Article(s) \_\_\_\_\_, was sentenced to \_\_\_\_\_ on \_\_\_\_\_  
at \_\_\_\_\_ by \_\_\_\_\_.  
The convening authority (approved the sentence) (approved only so much of the sentence as provided for \_\_\_\_\_) and the case was received in the United States Army\* Judiciary on \_\_\_\_\_.

3. In review pursuant to Uniform Code of Military Justice, Article 66, it is requested that attention be given to the following issues:

A. WHETHER THE SPECIFICATION OF CHARGE I FAILS TO STATE AN OFFENSE UNDER THE UNIFORM CODE OF MILITARY JUSTICE IN THAT IT DOES NOT ALLEGE THAT ACCUSED'S ABSENCE WAS WITHOUT AUTHORITY.

B. WHETHER THE MILITARY JUDGE FAILED TO TAILOR HIS INSTRUCTIONS ON SENTENCE TO THE MATTERS PRESENTED IN EXTENUATION AND MITIGATION.

JOHN H. BROWN  
Major General, USA  
The Judge Advocate General

Received a copy of the foregoing Direction for Review this \_\_\_\_\_ day of \_\_\_\_\_ 19\_\_\_\_\_.

ROBERT JONES, Colonel, JAGC  
Chief, Government Appellate Division

HARRY ARNOLD, Colonel, JAGC  
Chief, Defense Appellate Division

JOHN C. SMITH, Esq.  
1 Ace Street  
Union, New Jersey 07083

\*Use Navy-Marine Corps, Air Force, or Coast Guard as the case may be.

Figure B-1. Attachment 1—Format for Direction for Review in the United States Army\* Court of Military Review

**B-2. Attachment 2—FORMAT FOR ASSIGNMENT OF ERRORS AND BRIEF ON BEHALF OF ACCUSED (RULE 16)**

Format for Assignment of Errors and Brief on Behalf of Accused (Rule 16)

---

IN THE UNITED STATES ARMY <sup>1</sup> COURT OF MILITARY REVIEW					
UNITED STATES			ASSIGNMENT OF ERRORS AND		
v.			BRIEF ON BEHALF OF ACCUSED		
Private (E-1) JOHN RICHARD DOE, SSN			Case No. _____		
000-00-000, U.S. Army, Replacement			Tried at _____, on _____		
Detachment, 300th Administration			before a G.C.M. appointed		
Company, 300th Infantry Division,			by _____.		
Fort Gordon, Georgia, 31093					

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES ARMY <sup>1</sup>  
COURT OF MILITARY REVIEW

On \_\_\_\_\_, the accused was tried by general court-martial.  
The charges and specifications upon which he was arraigned, his pleas, and the court-martial's findings were as follows:

Chg	Art UCMJ	Specs	Summary of Offense	Pleas	Findings
I	86	1	AWOL (28 Jan) _____ 28 Feb _____)	G	G
		2	AWOL (3 Mar _____ -3 Apr _____)	G	G
II	121		Larceny of \$100.00, property of U.S. Government.	NG	G

He was sentenced to dishonorable discharge, forfeiture of all pay and allowances, confinement at hard labor for 2 years, and reduction to the lowest enlisted grade. The convening authority approved only so much of the sentence as provides for bad conduct discharge, forfeiture of \$50.00 pay per month for 6 months, and reduction to the lowest enlisted grade.

<sup>1</sup> Use Navy-Marine Corps, Air Force, or Coast Guard as the case may be.

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**Figure B-2. Attachment 2—Format for Assignment of Errors and Brief on Behalf of Accused (Rule 16)**

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## Statement of Facts

Those facts necessary to a disposition of the assigned errors are set forth in the argument, *infra*.<sup>2</sup>

## Errors and Argument

### I

#### SPECIFICATION 1 OF CHARGE I FAILS TO STATE AN OFFENSE UNDER THE UNIFORM CODE OF MILITARY JUSTICE.

The allegation of absence in Specification 1 of Charge I fails to indicate that the absence was “without proper authority.” The United States Court of Military Appeals has held that such an omission is fatal to the legal sufficiency of the specification. *United States v. Schultz*, 16 U.S.C.M.A. 488, 37 C.M.R. 108 (1967); *United States v. Fout*, 3 U.S.C.M.A. 565, 13 C.M.R. 121 (1953).

WHEREFORE, the findings as to Specification 1 of Charge I should be set aside and the sentence reassessed on the basis of the remaining charges and specifications.

### II

#### THE MILITARY JUDGE FAILED TO TAILOR HIS INSTRUCTIONS ON SENTENCE TO THE MATTERS PRESENTED IN MITIGATION AND EXTENUATION.

There was extensive evidence presented on behalf of accused to establish his proper exemplary conduct in civilian and military life. (R. 108–133). The military judge limited his instructions on sentence to the maximum authorized punishment and the voting procedure.

In *United States v. Wheeler*, 17 U.S.C.M.A. 274, 38 C.M.R. 72 (1967), the failure of the military judge to tailor the instructions on sentence to the evidence presented in mitigation and extenuation was held to require a rehearing on sentence.

WHEREFORE, the sentence should be set aside and a rehearing authorized thereon.

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<sup>2</sup> Where a statement of facts generally applies to all of the assigned errors, it may be set forth here.

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### SENTENCE APPROPRIATENESS

Accused is an 18-year old first time offender (Post-trial Review, p. 3) and has sincerely urged his restoration to duty. (R. 100). His immediate superiors have expressed their willingness to have accused return to his organization. (R. 110).

WHEREFORE, only so much of the sentence as provides for forfeiture of \$50.00 pay per month for 6 months, confinement at hard labor for 6 months, and reduction to the lowest enlisted grade should be approved by this Honorable Court.

DATE:

JOHN C. SMITH, Esq.  
1 Ace Street  
Union, New Jersey 07083

ALBERT JONES, Captain, JAGC  
Appellate Defense Counsel

HARRY ARNOLD, Colonel, JAGC  
Appellate Defense Counsel

### CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was mailed or delivered to appellate Government counsel on the \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_.

\_\_\_\_\_  
NAME

\_\_\_\_\_  
ADDRESS

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Figure B-2. Attachment 2—Format for Assignment of Errors and Brief on Behalf of Accused (Rule 16)—Continued

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